No. 88-461

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, Acting Commissioner, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTION PRESENTED

Whether a recipient of a directive issued by the State of New Jersey Department of Environmental Protection pursuant to the New Jersey Spill Compensation and Control Act is denied due process.

PARTIES

The parties appearing in the New Jersey Supreme Court were Kimber Petroleum Corporation and Solar Oil Company, appellants below and the State of New Jersey Department of Environmental Protection, appellee below.

The appellant for this appeal is Kimber Petroleum Corporation.* The appellee is Christopher J. Daggett, Acting Commissioner, State of New Jersey Department of Environmental Protection.

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* As required by Supreme Court Rule 21.1 and 28.1, the following is a listing of the parents, subsidiaries (except wholly-owned subsidiaries) and affiliates of appellant: Carleton Oil Corp. and S.K.S. Inc.

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No.

In The

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October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, Acting Commissioner, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Kimber Petroleum Corporation prays that the Court review a judgment entered by the New Jersey Supreme Court which upheld the constitutionality of the enforcement mechanism of the New Jersey Spill Compensation and Control Act.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 110 N.J. 69 (1988).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on April 18, 1988. A timely petition for rehearing was denied without comment by Order filed on May 25, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New Jersey Spill Compensation and Control Act (hereinafter the "Spill Act"), N.J.S.A. 58:10-23.11 to -23.11z and the Fifth and Fourteenth Amendments to the United States Constitution are involved in the case.

STATEMENT OF CASE

A. PROCEDURAL HISTORY

On May 29, 1986 a directive was issued by the New Jersey Department of Environmental Protection (hereinafter "DEP") to Kimber Petroleum Corporation (hereinafter "Kimber"), Solar Oil Company (hereinafter "Solar") and Shell Oil pursuant to the New Jersey Spill Compensation and Control Act N.J.S.A. 58:10-23.11 to -23.11(Z) (hereinafter "Spill Act), directing the recipients to pay $2,164,137.00 to fund the cost of certain work outlined in the directive. The work consisted primarily of the construction of a new water system in an area of West Milford, New Jersey, only part of which was alleged to be suffering from contamination being attributed to the recipients of the directive.

The directive required the recipients to pay the $2,164,137.00 within 30 days or face substantial penalties including treble damages.

On July 17, 1986, Kimber and Solar filed a Notice of Appeal from the directive with the New Jersey Superior Court, Appellate Division. Kimber and Solar also requested the Appellate Division to enter an Order staying the enforcement of the directive and its penalty provisions during the pendency of the appeal. The Court entered a temporary stay pending further consideration of the motion up to and including July 31, 1986. DEP filed a brief in opposition to the application on July 25, 1986. On July 26, 1986, Kimber and Solar filed a reply brief.

On July 31, 1986, the Appellate Division denied the motion for a stay. Kimber and Solar moved before Associate Justice Robert L. Clifford pursuant to the New Jersey Court Rules seeking, among other things, an Order staying the decision and/or action of the DEP embodied in its directive and for an Order enjoining DEP from seeking sanctions, including treble damages against them during the pendency of their appeal.

Justice Clifford entered an Order on that date staying the directive pending consideration of the request for a stay by the full Court.

On October 20, 1986, the New Jersey Supreme Court entered an Order reserving decision on the motion to supplement the record, granting appellants motions to accelerate the appeal and to file an overlength brief and certifying to that Court the appeal pending in the Appellate Division. The Court also stayed the treble damage portion of the directive provided the recipients either posted a bond or made a direct payment in the amount of the directive to the DEP. Kimber complied with this order and posted adequate security so that the DEP was enjoined from seeking or imposing sanctions or penalties, including treble damages, based

upon Kimber's failure to pay the amount of the directive pending disposition of the appeal.

On April 18, 1988 the New Jersey Supreme Court issued an opinion in which it performed "judicial surgery" on the enforcement mechanism of the Spill Act. Upon completion of the "judicial surgery" the Court found the Spill Act constitutional under both the New Jersey and United States Constitutions and then upheld the directive issued by the DEP to Kimber and Solar.

On April 28, 1988 Kimber filed a timely motion for reconsideration seeking clarification of the New Jersey Supreme Court's Opinion. On May 4, 1988 the DEP filed opposition to that motion. In an order signed by the Clerk of the New Jersey Supreme Court on May 24, 1988 and filed on May 25, 1988 the Court denied the motion for reconsideration without comment.

Kimber appeals from the opinion and order of the New Jersey Supreme Court upholding the constitutionality of the Spill Act under the United States Constitution.

B. BACKGROUND AND FACTUAL ALLEGATIONS

This appeal involves the constitutionality of the Spill Act under the United States Constitution. Appellant challenges the constitutionality of the Spill Act on its face and as construed by the New Jersey Supreme Court. Kimber also challenges the Act as applied to Appellant under the circumstances of the directive issued to it by the DEP and upheld by the New Jersey Supreme Court. Appellant submits that the Spill Act violated its due process rights by failing to afford it a hearing to challenge the validity of the Administrative Directive without subjecting it to mandatory treble damages. Appellant was coerced into posting security for the amount of the directive in order to avoid treble damages during the pendency of the appeal even though it has good cause to

challenge various aspects of the directive. For example, fundamental factual issues exist with respect to the underlying basis of the issuance of the directive, including the identity of proper parties, the propriety of the scope of remediation, the costs of the remediation plan and the responsibilities of the parties for the alleged damages. The exercise of its right to judicial review of the directive has resulted in a penalty to Kimber.

The Spill Act provides no mechanism through which a party determined to be a recipient by DEP may challenge that determination or the potentially ruinous consequences which result from such a determination without subjecting themselves to treble damages.

N.J.S.A. 58:10-23.11f(a) provides, in pertinent part, that:

> Whenever any hazardous substance is discharged, the Department may in its discretion, act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge . . . Any discharger who fails to comply with such a directive *shall* be liable to the Department in an amount equal to three times the cost of such removal. (emphasis added).

There is no method under the statutory scheme for a recipient of a directive to seek administrative or judicial review of the DEP determination, unless that recipient is so bold as to be willing to assume the risk of having mandatory treble damages imposed against it. Prior to the New Jersey Supreme Court decision, the only defenses available to a recipient challenging a directive were found in N.J.S.A. 58:10-23.11g(d) which states:

> An act of omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

"Good faith" or "good cause" defenses were, therefore, not relevant to an inquiry as to whether a party should be saddled with treble damages.

In its opinion below the New Jersey Supreme Court found that "[w]ithout an implied good cause, or reasonable cause exception the statute may infringe the state or federal constitution." 110 N.J. 69, 82 (1988). The Court then engrafted good cause defenses upon the Spill Act and upheld its constitutionality and affirmed the directive issued to Kimber subject to any good-cause defense that may be raised by Kimber.

Notwithstanding this holding, the Court then opined that since it had "ordered the parties to pay the remedial costs assessed by the directive or security for those costs" and had "for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive," good cause defenses would not be considered by the Court with respect to Kimber.

The DEP takes the position that because Kimber complied with the Court's order to post security, Kimber waived its right to raise those good cause defenses the Court engrafted onto the Spill Act in order to find the Spill Act constitutional.

Kimber brought its motion for reconsideration in an attempt to clarify how it was to be able to present its good faith defenses. The motion for reconsideration was denied without comment.

As a consequence, at no point has Kimber been given nor will it be given the opportunity to challenge in an administrative or judicial forum the factual basis or scope of the directive issued to it by the DEP.

C. THE ENFORCEMENT MECHANISM OF THE SPILL COMPENSATION AND CONTROL ACT UNCONSTITUTIONALLY DEPRIVED KIMBER PETROLEUM CORPORATION OF DUE PROCESS.

This case demonstrates the unconstitutional and impermissible effect of DEP Directives upon any party who may be responsible to the slightest degree under the Spill Act. The statutory requirements of the Spill Act to make payment absent any opportunity to challenge the enforcement mechanism prior to payment results in an unconstitutional deprivation of procedural due process rights afforded all litigants under the Fifth and Fourteenth Amendments of the United States Constitution. These constitutional infirmities are compounded by the fact that any attempt to challenge the enforcement mechanism prior to payment subjects such a bold litigant to the imposition of mandatory treble damages if the litigant is subsequently found to be to any degree responsible for the hazardous discharges at issue. [N.J.S.A. 58:10-23.11f(a)]. The effect is to chill appellant's constitutional right to seek judicial review of DEP's actions.

Furthermore, the post-payment remedies provided for under the claims procedure of the Spill Act, N.J.S.A. 58:10-23.11g-q also fail to provide a meaningful opportunity for litigants to raise defenses to the sanctions imposed upon them. More critically, recipients of directives found to be responsible to any degree apparently do not have even the post-payment claims procedure available to them. *State, Dept. of Environ. Protect. v. Ventron Corp.*, 182 N.J. Super. 210, 228 (App. Div. 1981), *mod. on other grounds*, 94 N.J. 473 (1983).

The New Jersey Supreme Court attempts to remedy the constitutional infirmity it found with the Spill Act by providing that good cause defenses can be raised by recipients of directives at an enforcement proceeding. As a result of Kimber's challenge to the Spill Act and compliance with the New Jersey Supreme Court's order to post security in the amount of the directive, it apparently is to be denied the very right to raise good cause defenses all other DEP Directive recipients are granted. This result is patently wrong and fundamentally unfair.

D. RECIPIENTS OF DIRECTIVES ISSUED BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION HAVE A DUE PROCESS RIGHT TO CHALLENGE THE VALIDITY OF THE ADMINISTRATIVE ORDER WITHOUT BEING SUBJECT TO PENALTIES.

It is well settled that a person has a due process right to challenge the validity of an administrative order without fear of massive mandatory penalties if the challenge is unsuccessful. This Court recognized this basic proposition of law as early as 1908 in the case of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 32 L. Ed. 714. Since the *Young* decision, the United States Supreme Court has repeatedly reaffirmed this principle. For instance, in *Oklahoma Operating Co. v. Love,* 252 U.S. 331, 336 (1920), Justice Brandeis noted that where penalties are so excessive as to "deter even the boldest and most confident" party from litigating a matter, then that party has been denied due process.

A basic requirement of due process is that a party be afforded an opportunity to be heard at a hearing conducted at a meaningful time and in a meaningful manner. *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970) (pretermination evidentiary hearing required before welfare benefits can be terminated); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187 (1965) (hearing required before parental rights can be terminated).

Kimber submits that a statute which forces it to risk the imposition of mandatory treble damages in order to challenge a directive is invalid.

Kimber believes that adding a good cause defense to the Spill Act modeled after the federal Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607(c)(3)(1982), as the New Jersey Supreme Court has done, is insufficient to save the statute.

Kimber raised the issue of denial of its due process rights in its applications for stays in the New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court as well as its challenge to the Spill Act on the merits before the New Jersey Supreme Court. The Court, in its opinion, rejected this challenge when it engrafted the good cause defenses onto the statute.

Even assuming this Court were to find the Spill Act as modified by the New Jersey Supreme Court constitutional, its application to Kimber fails to meet constitutional muster. The actions of the New Jersey Supreme Court, in ordering Kimber to post security for the amount of that directive in order to avoid treble damages, has deprived Kimber of the right to the good cause defenses the Court felt compelled to engraft onto the statute to make it constitutional.

REASONS FOR GRANTING THE APPEAL

GRANTING THIS APPEAL AND PROVIDING PLENARY CONSIDERATION WILL PROVIDE KIMBER WITH DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

The issues raised by this appeal have broad implications with respect to the enforcement mechanisms employed to force

compliance with federal and state environmental cleanup statutes. Kimber seeks this review not only to address those broad issues but also to enable it to receive the right to raise good cause defenses which the New Jersey Supreme Court felt necessary to engraft onto the Spill Act so that the Spill Act could survive Kimber's constitutional challenge.

Kimber's predicament is directly the result of the combination of three actions by the New Jersey Supreme Court. The first action of the New Jersey Supreme Court that placed Kimber in this position was its order compelling Kimber to post security for the $1,882,137.00[1] full amount of the directive in order to avoid the penalty provisions, including the treble damage provision, of the Spill Act. (Kimber complied with this order).[2] The second action of the New Jersey Supreme Court was its determination to legislate a change in the Spill Act rather than simply hold the act of the legislature unconstitutional. The third action of the New Jersey Supreme Court was its affirmance of the directive issued to Kimber.

Unless this Court grants Kimber's appeal and provides Kimber with a plenary hearing, Kimber will be left without a remedy. It will be deprived of due process under the United States Constitution because of the actions of the New Jersey Supreme Court.

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1. On March 3, 1987, the DEP issued Directive II which, among other things, reduced the original directive by $282,000.00.

2. Ironically, since Solar did not comply with the Supreme Court's order it would have a right to assert good cause defenses in any cost recovery action brought by DEP.

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant it a plenary hearing on this appeal.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DATED APRIL 18, 1988 (110 N.J. 69)

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR OIL COMPANY.

Argued November 18, 1986—Decided April 18, 1988.

SYNOPSIS

Alleged dischargers of hazardous waste appealed Department of Environmental Protection directive requiring them to pay over $2 million to fund construction of alternate water supply, and sought stay of order pending appeal. The Superior Court, Appellate Division, denied motion for stay and certified appeal. The Supreme Court, Handler, J., held that: (1) directive requiring alleged dischargers to pay for construction of alternative water supply required by local groundwater contamination was implicitly within broad authority granted DEP under the Spill Compensation and Control Act and under the DEP's authorizing legislative; (2) treble damages need not be assessed under the Spill Act if party opposing such damages has objectively reasonable basis for believing that DEP's directive was invalid or inapplicable to party; and (3) record was insufficient to determine whether dischargers could be required to pay for creation of alternative long-term water supply.

Affirmed as modified.

Wilentz, J., filed dissenting opinion.

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1. Health and Environment ⇐25.7(23)

Department of Environmental Protection's directive requiring alleged dischargers to pay for construction of alternative

water supply required by local groundwater contamination was implicitly within broad authority granted DEP under the Spill Compensation and Control Act and under the DEP's authorizing legislative, even though the Spill Act directly authorized DEP only to remove waste and bring cost recovery action against responsible parties or to direct responsible party to remove waste. N.J.S.A. 13:1D–1 to 13:1D–19, 58:10–23.11g, subds. c, d, 58:10–23.11q.

2. Arbitration ⇐29.2

Arbitration provisions of Spill Compensation and Control Act do not limit arbitrator's powers to considering challenges to amount of costs, but, rather, are broad enough to cover any challenge to validity of any aspect of directive; however, remedy is illusory in most cases due to Department of Environment Protection's position that no recourse to fund or arbitration procedures may be had by partially responsible discharger. N.J.S.A. 58:10–23.11n, 58:10–23.11n, subds. a, c, d, g.

3. Health and Environment ⇐25.5(10)

Spill Compensation and Control Act does not require assessment of treble damages against party not complying with directive of Department of Environmental Protection if party had objectively reasonable basis for believing that directive was invalid or inapplicable to party. N.J.S.A. 58:10–23.11 et seq.

4. Health and Environment ⇐25.15(3.2)

Any decision by the Department of Environmental Protection to seek treble damages in recovery action under the Spill Compensation and Control Act is subject to judicial review like any other agency action. N.J.S.A. 58:10–23.11 et seq.

Appendix A

5. Health and Environment ⇐25.5(10)

"Good-cause defense" to treble damages provisions of the Spill Compensation and Control Act is relevant only when discharger refuses to comply with Department of Environmental Protection directive and DEP moves in court to enforce directive; if the court determines that discharger's basis for noncompliance is objectively reasonable, even if court does not ultimately uphold discharger's argument, DEP's request for treble damages may be rejected if not reasonable in light of all circumstances. N.J.S.A. 58:10–23.11 et seq.

6. Health and Environment ⇐25.5(5.5)

Party even remotely responsible for causing contamination is deemed "responsible party" under the Spill Compensation and Control Act. N.J.S.A. 58:10–23.11g, subd. c.

7. Health and Environment ⇐25.15(5.1)

Record was insufficient to determine on appeal whether alleged dischargers could be required to pay for creation of alternative long-term water supply, under Spill Compensation and Control Act. N.J.S.A. 58:10–23.11 et seq.

8. Health and Environment ⇐25.5(10)

In appropriate case, aggrieved party should have right, in action for reimbursement to recover costs of Department of Environmental Protection under the Spill Compensation and Control Act, to demonstrate that element of costs imposed by DEP is unreasonable; same contention raised on objectively reasonable basis could be "good-cause defense" to prepayment enforcement directive. N.J.S.A. 58:10–23.11 et seq.

Appendix A

Edwin R. Matthews and *Edward J. Farrell* argued the cause for appellants, Kimber Petroleum and Solar Oil Company (*Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade*, attorneys for Kimber Petroleum Corporation, and *Farrell, Curtis, Carlin & Davidson*, attorneys for Solar Oil Company; *Edwin R. Matthews, Edward J. Farrell, John D. O'Dwyer* and *Nancy Giacumbo*, on the briefs).

Ross A. Lewin, Deputy Attorney General, argued the cause for respondent, Department of Environmental Protection (*W. Cary Edwards*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, and *Michael R. Clancy*, Deputy Attorney General, of counsel; *Ross A. Lewin* and *John A. Covino*, Deputy Attorneys General, on the briefs).

James W. Christie submitted a brief on behalf of *amicus curiae*, Township of Gloucester (*Griffith, Burr, Angelini & Viniar*, attorneys).

William H. Hyatt, Jr. and *William J. Friedman* submitted a brief on behalf of *amici curiae*, Woodland Study Group, Minnesota Mining and Manufacturing Company and Rohm and Haas Company (*Pitney, Hardin, Kipp & Szuch*, attorneys).

The opinion of the Court was delivered by

HANDLER, J.

In 1984, the Department of Environmental Protection (DEP) investigated the source of a serious groundwater contamination in the Township of West Milford. The contamination was traced to an Amoco gasoline station leased by Kimber Petroleum Corporation and a Chevron gasoline station owned by Solar

Oil Sussex at the time of the contamination. The groundwater contamination required residents of the Greenbrook Estates neighborhood to be connected to an outside water supply. Acting pursuant to the New Jersey Spill Compensation and Control Act, DEP directed Kimber Petroleum and Solar Oil to pay $2.16 million to fund the construction of an alternate water supply, failing which each would be subjected to treble damages. Kimber Petroleum and Solar Oil resisted payment of these costs, appealed to the Appellate Division, and moved for a stay of DEP's order exacting costs and imposing treble damages upon a refusal to pay. On July 31, 1986, the Appellate Division denied the motion for a stay pending appeal. On October 20, 1986, the Court certified the appeal pursuant to *Rule* 2:12–2 and ordered appellants to pay or to post security for the claimed costs of the removal but enjoined the imposition of treble damages.

I.

Kimber Petroleum and Solar Oil challenge the constitutionality of the New Jersey Spill Compensation and Control Act (the Spill Act), *N.J.S.A.* 58:10–23.11 to –23.11z. In particular, they assert that the Spill Act's treble damages provision violates the parties' due process rights under the federal and state constitutions.

The treble damages section of the Spill Act is as follows:

> Whenever any hazardous substance is discharged, the [Department of Environmental Protection] may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge.... Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal ... [*N.J.S.A.* 58:10–23.11f(a).]

Appendix A

The following section deals with the polluter's liability:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing ... shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.
>
> An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act. [*N.J.S.A.* 58:10–23.11g(c), (d).]

Thus under these provisions a "discharger" is one who has "discharged a hazardous substance or is in any way responsible" for such a discharge. *Id.* The liability of a discharger is absolute—it is strict, "without regard to fault", and joint and several; only limited defenses not associated with fault—*i.e.*, relating to war, sabotage or divine factors—are available. *Id. See State, Dep't of Envtl. Protection v. Ventron Corp.*, 94 *N.J.* 473, 501–03 (1983) (liability under the Spill Act extends to parent corporation of wholly owned subsidiary that violated the Spill Act).

II.

[1] At the outset we point out that DEP, in issuing the directives in this case, has not been acting within the language of the Spill Act as strictly interpreted. The Act directly authorizes DEP to take one of two alternative actions when it discovers illegally-dumped hazardous waste: 1) it can act to remove the waste (and then bring a cost-recovery action against the responsible parties, *N.J.S.A.* 58:10–23.11q), or 2) it can direct a responsible party to remove the waste. *N.J.S.A.* 58:10–23.11g(c), (d). In this case, DEP has done neither. DEP's directive to Kimber Petroleum and Solar Oil required Kimber Petroleum to pay the money necessary for the work DEP intended to undertake in the construction of an alternative

water supply required by the local groundwater contamination. DEP did not seek relief by way of a cost-recovery action nor did it direct Kimber Petroleum and Solar Oil to do the work. This raises as a threshold question the validity of DEP's action in this case as a basis for treble damages. Though this issue was not fully raised by the parties, we believe it appropriate to deal with it at this time.

DEP's practice of requiring payment by responsible parties while maintaining control itself over remedial actions is not directly authorized by the Spill Act.[1] Nevertheless, DEP's ability directly to undertake removal of a discharge, thereby assuring the elimination of toxic contamination while concomitantly securing removal costs from responsible parties, would appear to be highly necessary as a means of effective enforcement of the Spill Act. DEP has the discretion, implicit in its broad implied powers, to require responsible polluters to pay for cleanup or removal costs prior to remedial action.[2] *See New*

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[1]Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *U.S.C.* §§ 9601 to 9657, the Environmental Protection Agency (EPA) has three options: 1) it may file a civil suit to force a responsible party to remove the hazardous waste, *id.* at § 9606(a); 2) it may issue an administrative order requiring removal; *id.*, and 3) it can use Superfund moneys for the cleanup, and the responsible parties would then be liable for those amounts to the Superfund. *Id.* at §§ 9604(a)(1), 9612(c)(1); *see Wagner Elec. Corp. v. Thomas*, 612 *F.Supp.* 736, 738 (D.C.Kan.1985). The EPA thus does not seem to be authorized by CERCLA to act in a way analogous to the way that DEP has acted in this case: *i.e.*, to maintain control of the cleanup operations while requiring the responsible parties to prepay.

[2]However, we note that if the DEP completed the cleanup and removal and then assessed costs, the accuracy of DEP's assessment of the costs would not be the issue it predictably is when a directive is issued to an alleged polluter before the cleanup has begun.

Jersey Guild of Hearing Aid Dispensers v. Long, 75 *N.J.* 544 (1978); *cf. GATX Terminals Corp. v. State, Dep't of Envtl. Protection*, 86 *N.J.* 46, 52 (1981) (statutory power to clean up spills provides basis to prevent spills). We are satisfied that the practice is implicit in the broad authority granted the Department under the Spill Act and under the Department's own authorizing legislation, *N.J.S.A.* 13:1D–1 to –19.

III.

The United States Supreme Court has upheld the validity under the federal constitution of multiple damages provisions. *Overnight Motor Transp. Co. v. Missel*, 316 *U.S.* 572, 584, 62 *S.Ct.* 1216, 1223, 86 *L.Ed.* 1682, 1691 (1942); *Missouri Pac. Ry. Co. v. Tucker*, 230 *U.S.* 340, 348–49, 33 *S.Ct.* 961, 962–63, 57 *L.Ed.* 1507, 1510 (1913); *Missouri Pac. Ry. Co. v. Humes*, 115 *U.S.* 512, 523, 6 *S.Ct.* 110, 114, 29 *L.Ed.* 463, 466 (1885). The Supreme Court regularly applies antitrust legislation, which, like the Spill Act, combines treble damages with joint and several liability. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 *U.S.* 630, 101 *S.Ct.* 2061, 68 *L.Ed.*2d 500 (1981); *Cantor v. Detroit Edison Co.*, 428 *U.S.* 579, 96 *S.Ct.* 3110, 49 *L.Ed.*2d 1141 (1976). The Sherman Antitrust Act has been interpreted in a way that those subjected to onerous joint and several liability provisions have no right of contribution. *Texas Indus., supra.*

The plaintiffs do not, however, claim that the Spill Act's treble damages provision, as such, is invalid.[3] Instead they

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[3]A number of other New Jersey statutes authorize the recovery of treble damages. *See, e.g., N.J.S.A.* 2A:18–61.6 (fraudulent eviction), 2A:33–2 (impounding distressed chattels), 17:33A–7 (insurance fraud), 46:10A–2 (mortgage financing), 56:4–2 (unfair competition).

point to the fact that this provision is only triggered when a DEP order is disputed and claim that this is unconstitutional because it serves to deter judicial challenge to state action.

In *Ex parte Young*, 209 *U.S.* 123, 28 *S.Ct.* 441, 52 *L.Ed.* 714 (1908), the Supreme Court invalidated state rate-making legislation because the legislation permitted railroads to obtain judicial review of rates only as defendants in criminal prosecutions. The legislation violated due process because "the penalties for disobedience [were] by fines so enormous and imprisonment so severe as to intimidate [affected parties] from resorting to the courts to test the validity of the legislation." *Id.* at 147, 28 *S.Ct.* at 448, 52 *L.Ed.* at 724. With this type of legislation, "the result is the same as if the law in terms prohibited the [affected party] from seeking judicial construction of laws which deeply affect its rights." *Id.* If a challenging party has reasonable grounds for contesting the validity or applicability of an administrative order, it must be able to do so without penalty. *See Ex parte Young, supra*; *Oklahoma Operating Co. v. Love*, 252 *U.S.* 331, 338, 40 *S.Ct.* 338, 340, 64 *L.Ed.* 596, 599 (1920) (issuing permanent injunction restraining enforcement of penalties accruing during litigation "provided that the plaintiffs had reasonable ground to contest them"); *Reisman v. Caplin*, 375 *U.S.* 440, 84 *S.Ct.* 508, 11 *L.Ed.*2d 459 (1964).

The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *U.S.C.* §§ 9601 to 9657, has a provision similar to, but not identical with, the Spill Act's treble damages provision. 42 *U.S.C.* § 9607(c)(3) states:

> If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act,

> such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

The main difference between the language in the Spill Act and that of CERCLA is the former's mandatory tone. *Compare N.J.S.A.* 58:10–23.11f(a) ("Any discharger who fails to comply ... *shall* be liable ... in an amount equal to three times the cost of such removal.") (emphasis added) *with* 42 *U.S.C.* § 9607(c)(3) ("If any person ... fails *without sufficient cause*", etc.) (emphasis added).

CERCLA's treble damages provision has been challenged on the same ground as the Spill Act's treble damages provision is today challenged, as an allegedly unconstitutional infringement of federal due process rights. The federal courts that have addressed this claim have ruled that CERCLA's provision is constitutional. They have done so in part by interpreting the phrase "without sufficient cause" to authorize a "good faith defense": a party will not be liable for treble damages if it has a reasonable good faith belief that it has a valid defense to the remedial order. *Solid State Circuits, Inc. v. United States*, 812 *F.*2d 383 (8th Cir.1987); *Wagner Seed Co. v. Daggett*, 800 *F.*2d 310 (2nd Cir.1986); *Aminoil, Inc. v. United States*, 646 *F.Supp.* 294 (C.D.Calif.1986); *Wagner Elec. Corp. v. Thomas*, 612 *F.Supp.* 736 (D.Kan.1985); *United States v. Reilly Tar & Chem. Corp.*, 606 *F.Supp.* 412 (D.Minn.1985). Under a good-faith exception, treble damages cannot be imposed on a non-complying party "if the party opposing such damages had an objective reasonable basis for believing that the EPA's order was either invalid or inapplicable to it." *Solid State Circuits, supra*, 812 *F.*2d at 391 (footnote omitted).

The State purports to sidestep these constitutional claims by arguing that the directives that apparently impose potential liability for treble damages are actually merely notice of obligations under the Spill Act. It characterizes the treble damages provision as a mandatory, not a conditional, multiple damages provision. It argues that the directives do not possess independent legal force, *i.e.*, they do not as such prescribe liability for treble damages, but serve only to provide notice to potentially responsible parties of their obligations under the Spill Act. The directive, according to the State, simply gives the polluter the opportunity to clean up any dump sites for which it is responsible, thus serving only as a notice and as a basis for a defense to the imposition of treble damages liability: if the notice is not sent, liability cannot be imposed. The State contends that since the Legislature has the power to impose unconditional mandatory treble liability, it surely has the power to impose contingent treble damages, which benefits the alleged discharger—the ability to avoid "mandatory" multiple damages for the cleanup through compliance with the terms of the directive.

The State's characterization of the treble damages provision avoids reality. *N.J.S.A.* 58:10–23.11f(a) states that the only choice a company has when faced with a DEP directive is compliance or treble damages. Unlike most other laws with multiple damage provisions, the Spill Act's treble damages provision does not merely notify persons of potential liability and inform those persons how they may stay clear of illegal behavior. These provisions are indisputably coercive; they have the purpose and the effect of compelling persons to pay money to the State, even if those persons have a valid claim that they are not justly or legally responsible for the payment.

No exception is made for those who refuse compliance in order first to determine the directive's validity. However, the DEP argued that even though a charged party cannot avoid compliance with the required payment of costs, there are means available for bringing a challenge to the validity of a DEP directive without risking further penalties. The alleged violator can pay the costs assessed in the directive and then seek reimbursement from the Spill Fund. Such hearings would be before boards of arbitration with appeals to the Appellate Division.

> Boards of arbitration shall be convened by the administrator when persons alleged to have caused the discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. If the source of discharge is not known, any person may contest such claims presented for payment to the fund.
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> One board of arbitration may be convened to hear and determine all claims arising from or related to a common discharge.
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> The boards shall have the power to order testimony under oath and may subpoena attendance and testimony of witnesses and the production of such documentary materials pertinent to the issues presented to the board for determination. Each person appearing before the board shall have the right to counsel.
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> Determinations made by the board shall be final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days of the filing of the decision by the administrator. [*N.J.S.A.* 58:10–23.-11n(a), (c), (d), (g).]

[2] The Supreme Court has held that it is sufficient for the due process guarantee of the federal constitution that there be

some forum where an order's validity can be challenged without penalty; it need not be the same forum where enforcement actions are prosecuted and the challenge need not be pre-payment. *Yakus v. United States*, 321 *U.S.* 414, 64 *S.Ct.* 660, 88 *L.Ed.* 834 (1944). Under this analysis, the pre-adjudication payment of actual costs under the statute with the opportunity later to contest the legality or reasonableness of such costs without further penalty [4] could be viewed as satisfying essential due process concerns.

Nevertheless, under the circumstances, there remain doubts as to the Act's validity under the federal constitution because of the way in which it combines the lack of a pre-enforcement hearing with strict liability and added penalty for noncompliance.

The United States Supreme Court has never before ruled on the constitutionality of a statutory enforcement scheme that combined, as the Spill Act does, joint and several liability, nearly absolute liability, the virtual elimination of substantive defenses, mandatory treble damages, and no pre-enforcement hearing. In *Woodland Private Study Group v. State of N.J.*, 616 *F.Supp.* 794 (D.N.J.1985), the validity of such a scheme, in the context of the Spill Act, was examined by a federal district

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[4]Kimber Petroleum and Solar Oil argue that arbitration is an inadequate alternative forum for challenging the validity of DEP's Directives because only the amount of costs can be challenged in that forum. We do not agree with the implied narrow reading of *N.J.S.A.* 58:10–23.11n. The scope of the arbitrator's powers under that section is clearly broad enough to cover and challenge brought to the validity of any aspect of a directive. However, the DEP maintains that no recourse to the fund or its arbitration procedures may be had by a partially responsible discharger. Thus the remedy is illusory in almost all cases.

court and found to satisfy due process requirements.[5] The court's analysis in that case, however, failed to fully focus on the significance of the fact that the Act's provision of a means to challenge administrative action is *only* free of the threat of added punitive damages if done *after* compliance with such action.

Due process standards arguably call for a right to challenge the validity of a legislative or administrative order without facing the possibility that one will incur a greater penalty if such challenge is unsuccessful than the loss resulting from such an order if left unchallenged. *See United States v. Pacific Coast European Conference*, 451 *F.*2d 712, 717 (9th Cir.1971) (under due process a "constitutional tolling principle" prevents one from being forced to pay a statutory penalty for noncompliance with an act during the time it is being tested in good faith); *cf. Brown & Williamson Tobacco Corp. v. Engman*, 527 *F.*2d 1115, 1119 (2nd Cir.1975) ("one has a due process right to contest the *validity* of a legislative or administrative order ... without necessarily having to face ruinous

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[5]The *Woodland* court based its determination on its conclusion that the Act's post-enforcement arbitration provision satisfied the needs of parties claiming innocence of any wrongdoing. Some question arises, however, as to the adequacy of this provision for parties admitting responsibility but contesting the amount of money determined by the DEP as being required. One reading of the Act would find arbitration unavailable, at least to the extent of any contested amounts, in such a situation. *See Tree Realty, Inc. v. Department of Treasury*, 205 *N.J.Super.* 346, 349 (App.Div.1985) (any party in any way responsible for an offending discharge is fully liable and "there is no point in submitting the matter to arbitration."). Such a problem would not arise, however, if a good-cause defense was read into the Act.

penalties if the suit is lost."). While none of the individual components of the Spill Act enforcement framework violates due process requirements the combined weight of the joint and several strict liability scheme with the lack of a pre-enforcement hearing opportunity and the imposition of punishment in the form of treble damages upon failure to comply—even if such failure is predicated upon a reasonable defense—may be beyond constitutional tolerance.

The parties have questioned the Spill Act's validity under the New Jersey Constitution and the state doctrine of fundamental fairness.[6] The New Jersey Constitution offers protections that go beyond those offered by the United States Constitution. *See State v. Novembrino*, 105 *N.J.* 95 (1987); *State v. Hunt*, 91 *N.J.* 338 (1982); *State v. Alston*, 88 *N.J.* 211 (1981). We have resorted to the state constitution when there was uncertainty as to the protection afforded by the federal constitution. *See, e.g., State v. Williams*, 93 *N.J.* 39 (1983); *State v. Schmid*, 84 *N.J.* 535 (1980), appeal dismissed *sub nom. Princeton Univ. v. Schmid*, 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1982). In a variety of contexts we have concluded that, compared with the federal constitution, the state constitution affords parallel protections, *e.g., State v. Gilmore*, 103 *N.J.* 508 (1986); *State v. Saunders*, 75 *N.J.* 200 (1977), or greater protections, *e.g., State v. Novembrino, supra; State v. Alston, supra.* In addition,

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[6]*Cf. Pennzoil v. Texaco*, — *U.S.* —, — — — & nn. 10–11, 107 *S.Ct.* 1519, 1526–27 & nn. 10–11, 95 *L.Ed.*2d 1, 16–17 & nn. 10–11 (1987) (federal court should abstain from determining validity of state statute under the federal constitution in part to give the state courts an opportunity to modify the statute's interpretation in light of a state constitutional provision).

the doctrine of fundamental fairness, which has roots in the New Jersey Constitution and in New Jersey common law, has been applied to grant persons procedural protections that may exceed those offered by the due process clause of the federal constitution. *See, e.g., State v. Abbati*, 99 *N.J.* 418 (1985); *State v. Gaffey*, 92 *N.J.* 374 (1983); *State v. Tropea*, 78 *N.J.* 309 (1978); *State v. Talbot*, 71 *N.J.* 160 (1976); *State v. Gregory*, 66 *N.J.* 510 (1975); *State v. Kunz*, 55 *N.J.* 128 (1969). *See generally State v. Ramseur*, 106 *N.J.* 123, 376–79 (1987) (Handler, J., dissenting) (discussing fundamental fairness protections against arbitrary governmental actions). We have recognized the relevance of independent state constitutional protections and the doctrine of fundamental fairness for the protection of civil rights and interests. *See State v. 1979 Pontiac Trans Am, Color Grey*, 98 *N.J.* 474 (1985); *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982); *Burlington County NAACP v. Mt. Laurel*, 67 *N.J.* 151 (1975); *cf. Cunningham v. Department of Civil Serv.*, 69 *N.J.* 13 (1975) (as a matter of fundamental fairness and administrative due process demoted civil service employees held entitled to an evidentiary hearing to resolve a contested factual issue); *King v. South Jersey Nat'l Bank*, 66 *N.J.* 161, 191–98 (1974) (Pashman, J., dissenting) (state constitution's guarantee of due process should be held to void a contract's acceleration clause).

The Spill Act, as the State would have it interpreted and applied, could have a draconian impact on affected parties. A small company with arguably little or no actual responsibility for the discharge of a hazardous substance might be forced to pay a large amount of money, with no effective pre-payment judicial recourse, no means to challenge the DEP's estimate of

the monetary amount needed, and a potentially long delay before it gets its refund from the Spill Fund or the contribution due from the other liable dischargers. The result in fact could be confiscatory. This kind of problem—undue harshness in the individual application of the Act's enforcement provisions—can be rectified by recognition of the availability of a good-cause exception. The availability of such an exception would allow a genuinely aggrieved party with legitimate defenses to urge these in order to avoid the imposition of heavy penalties. Provisions for such an exception could be achieved through the minimal modification of the literal terms of the Act by implying an exception similar to that found in CERCLA. *See supra* at 76. Without an implied good cause, or reasonable cause exception, the statute may infringe the state or federal constitutions.

[3, 4] The question thus presented is whether the implication of such a good cause exception can be reconciled with the intent of the Legislature. Given the choice between invalidating the Spill Act and reading a provision into the Act, we choose the latter course. "In appropriate cases, a court has the power to engage in 'judicial surgery' or the narrow construction of a statute to free it from constitutional doubt or defect." *N.J. Chamber of Commerce v. N.J. Elec. Law Enforcement Comm'n*, 82 *N.J.* 57, 75 (1980); *see Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 104 (1983). This action is appropriate when the Legislature would have preferred the statute to remain in effect in modified form to the statute being invalidated. *Id.* We therefore hold that treble damages need not be assessed if the party opposing such damages had an objectively reasonable basis for believing that DEP's directive was either

invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action. We find that such limitation comports with what we perceive to be the intent of the Legislature. When viewed in the context of the broadened implied powers granted the DEP under our analysis, the scheme effectuates the legislative intent of providing a powerful anti-pollution mechanism, serving to discourage potentially liable parties without needlessly acting against potentially innocent parties with undue harshness. The imputation of a narrowly drawn good-cause defense is a reasonable constraint on the broad implied agency powers we find by our expansion of the literal terms of the Spill Act.

[5] We are satisfied that so interpreted, the Act will not be significantly weakened and that responsible polluters will remain fully amenable to the necessarily strict enforcement machinery of the Act. The Spill Act serves the important interests of preventing and eliminating contamination from toxic waste dumps.[7] The authorization of a good-cause defense to the Act's treble damages provisions will validate the Act's enforcement mechanisms. The Act so construed does not mean that compliance with DEP directives will be slowed because some parties challenge the directives in court. This would misstate the procedural posture in which a good-cause defense comes into play. A good-cause defense is relevant only once a company refuses to comply with a DEP directive and DEP moves in

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[7]The need for action in this area; and, in particular, for state government action, was shown by a recent report that state[d] [t]hat nationally there are tens

(Con't)

court to enforce the directive. In accordance with its directive the DEP in its enforcement action may seek treble damages as a penalty for non-compliance.[8] If the court determines that a company's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances. The enforcement provisions of the Act will remain effective tools to secure swift compliance with the terms of the Act to the end that hazardous discharges are cleaned up as promptly as possible by those polluters responsible. Given the importance of the objectives the Spill Act serves, the Legislature would prefer somewhat less efficient, but still effective, enforcement-provisions to none at all.

We turn more specifically to the additional issues of what kind of good-cause defenses would be available in a treble damages/enforcement action. This calls for an examination of the substantive liability of parties for removal under the Act and the nature and extent of damages available.

[6] A party even remotely responsible for causing contamination will be deemed a responsible party under the Act. *See*

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of thousands of abandoned toxic waste dumps, of which around 20,000 are seriously contaminated. By contrast, in the seven years that the federal statute CERCLA has been in place to protect the public from such contamination, only 13 sites have been completely cleaned up. New York Times, April 19, 1987, at E4, col. 1.

[8]In addition, the DEP has the option of itemizing the amounts required by its directives in order to limit the extent of what can be reached by a good-cause defense.

Ventron Corp., supra. As dischargers, Kimber Petroleum and Solar Oil are each responsible parties regarding the contamination that made the local water supply unusable. *N.J.S.A.* 58:10–23.11g(c) states that responsible parties are liable for "all cleanup and removal costs." Thus each is liable under the Spill Act for the total costs entailed in the cleanup and removal of the contaminants.

[7] Since the Act provides for joint and several liability DEP's assessment of one's proportional share of liability will rarely be the subject of a good-cause defense. In addition, the Act's strict liability provision will severely restrict claims involving the initial triggering of liability. Nevertheless, there remains a number of possible good-cause defenses. Kimber Petroleum and Solar Oil, for example, raise several arguments against the validity of the statutory damages scheme. One claim is that the costs sought are unreasonable; it is asserted that the work to construct a new water supply is beyond the statutory liability of a responsible party, which is limited to, at most, the cleanup and removal of the hazardous waste discharge. The meaning of the statute on this point is not clear. *N.J.S.A.* 58:10–23.11g(a)(2) defines "all cleanup and removal costs" to include "the cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge." Funding the creation of an alternative water supply might also fit under the equally broad definition, *id.* at (a)(1), that cleanup and removal costs include damage to private property. Thus it is arguable that a discharger would be responsible for creating an alternative long-term water supply. On the other hand, the construction of the extensive infrastructure entailed in a water supply may not be within the contemplation of replacing a natural resource destroyed by a dis-

charge. Moreover, genuine disputes may arise in terms of whether the previous water supply was wholly a part of a "natural resource" and whether a discharge brought about the destruction of the natural resource, as well as in terms of the costs reasonably related to any replacement of the natural resource.

[8] While the statute then can be read broadly to encompass such far ranging costs as being included in "removal costs", we acknowledge a countervailing position that such costs exceed those reasonably within the contemplation of the statute. We cannot on the record presented and the issues actually argued resolve these questions of statutory construction. We raise them to suggest that in an appropriate case, an aggrieved party should have the right, in an action for reimbursement to recover costs, to demonstrate that an element of the costs imposed by DEP is unreasonable. An identical contention raised on an objectively reasonable basis could constitute a "good-cause defense" to a pre-payment enforcement directive.

IV.

We conclude that (1) a good-cause defense by necessary implication is provided under the treble damages provision of the Spill Act, (2) good-cause defenses include challenges to the reasonableness of the costs assessed, and (3) the DEP has the authority to seek removal costs from dischargers while controlling remedial action and obtain treble damages upon failure to pay such costs.

Accordingly, we rule that the DEP directive issued to Kimber Petroleum and Solar Oil threatening treble damages upon noncompliance complies with the Spill Act. The provisions of the

DEP directive ordering the payment of removal costs are valid and enforceable subject, however, to any good-cause defense that may be raised by the appellants. Nevertheless, in this case we need not consider further the applicability of a good-cause defense as a basis for denying treble damages because the Court has ordered the parties to pay the remedial costs assessed by the directive or security for those costs and has for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive. The directive of DEP, as modified by the order of this Court on appeal, is affirmed.

WILENTZ, C.J., dissenting.

The Court's decision today very substantially expands the power of the State, through the Department of Environmental Protection (DEP), to remedy the adverse effects of discharges of hazardous substances. In attempting to address the grave risks that hazardous substances pose to our society, the statute provides that the DEP may require a polluter to clean up and remove a hazardous discharge and its effects. Today the Court correctly finds that the DEP may alternatively require the polluter to pay on demand the estimated cost of such cleanup, leaving it to the Department to complete the task. Whereas the former is provided expressly in the statute, the latter power is found to exist by implication. This is a most important, indeed, a necessary, expansion of the Department's vital role in this area.

It is therefore ironic that in this same decision the Court provides polluters with a defense found nowhere in the Act. This defense allows a polluter to escape treble damages for

refusal to comply with a DEP demand for cleanup and removal money whenever the polluter's refusal to pay was based on "good cause." The Court thereby holds that despite the Act's explicit and unqualified requirement for cleanup on demand (or, alternatively, for payment on demand), the polluter who refuses to pay may successfully avoid liability for treble damages—the weapon designed by the Legislature to assure that cleanup funds would immediately be made available by polluters. If the polluter is found to have had "good cause" to refuse such payment, no treble damages are imposed *even though the polluter was, in fact and in law, liable for such payment.*

I dissent from that holding. Not only does the statute not provide for a "good cause" exception—on this there is no dispute—but furthermore the fair intent of the law is completely inconsistent with any such exception. The Constitution does not compel today's decision, which, contrary to the majority's assertions, will seriously erode the effectiveness of this law.

I.

The magnitude of our state's hazardous waste problem is beyond dispute. New Jersey produces 12.5% of the United States' chemical output, making the state the second largest chemical producer in the nation; 970 chemical plants are located in this state. Chemical Industry Council of New Jersey, Press Release (Trenton, N.J., n.d.). Moreover, chemicals produced out of state are transported along the northeast corridor via New Jersey's highways and railways, where accidents can lead to their release into this state's environment. The risks are aggravated by geologic, hydrologic, and soil conditions that make New Jersey's water supply peculiarly vulnerable to con-

tamination. Of the fifty states, New Jersey is thought to have the most severe hazardous waste problem. Morris, "Hazardous Wastes in New Jersey," 38 *Rutgers L. Rev.* 623, 624–26 (1986); *see also* New Jersey Department of Environmental Protections, *Status Report on the Hazardous Waste Management Program in New Jersey*, Vol. II at 19 (Oct. 1986) (New Jersey leads the nation in the number of hazardous waste sites identified by the Federal Superfund program with 97 of the 888 designated as of 1986); English, "Hazardous Waste Regulation: A Prescription for Clean Water," 13 *Seton Hall L. Rev.* 229, 230–31 n. 11 (1983) (by producing approximately 350,000 tons of hazardous waste per year, New Jersey surpasses all other states in the generation of hazardous waste).

The Legislature's decision to use unconventional remedies in the Spill Compensation and Control Act ("the Act" or the "Spill Act"), *N.J.S.A.* 58:10–23.11 to –23.11z, was based on a valid perception that this state faces an enormous environmental problem and that a great deal of money will be required to address it. The Legislature sought to require "the prompt containment and removal of ... pollution and substances." *N.J.S.A.* 58:10–23.11a. To help defray the costs, the Legislature created a fund by taxing those in the petrochemical industry. The Fund is available to pay damages promptly to victims of pollution and to finance cleanup and removal efforts. The Act states that

> [w]henever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon the money available in the fund. Such money shall be used to pay promptly for all cleanup costs incurred by the department in removing or in minimizing damage caused by such discharge. [*N.J.S.A.* 58:10–23.11f(a).]

Thereafter, the Fund seeks reimbursement from those responsible for the pollution.

A critical attribute of the law, then, is that it creates an immediately available source of funds to clean up discharges of hazardous materials. The conventional approach—a suit by the DEP to establish liability, a judgment requiring the defendant to clean up or to pay for the cleanup, and ultimately further orders to compel compliance (including orders holding defendant in contempt, setting a date for compliance, extending the date, and so on)—was deemed inadequate for the solution of the problem. The Legislature mandated the expeditious cleanup and removal of hazardous wastes because this problem is not static, but constantly growing. The need was for relief from pollution, not for judgments and orders that, although perhaps vindicating individual rights, would leave pollution removal to the remote and uncertain future. The Legislature concluded that there was a need for immediate relief. The Fund is one means devised by the Legislature to achieve this result. Its purpose is to make sure that cleanup and removal come first—through the Fund—with litigation, if any, to follow.

Despite its size, the Fund does not begin to meet New Jersey's cleanup needs. The problem of remedying both today's new spills and the consequences of past pollution far exceeds the limits of the Spill Fund.[1] It is obvious that more

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[1]The Act itself recognizes the Spill Fund's inadequacy. "*If and to the extent that he determines that funds are available*, the administrator shall approve and make payments for any cleanup and removal costs incurred by the Department for the removal of a hazardous substance...." *N.J.S.A.* 58:10-23.11f(c) (emphasis supplied). Shortages are also anticipated where the fund is used to pay damages. "In the event that the total awards for a specific occurrenc exceed the current balance of the Fund, the immediate award shall be paid on a prorated basis...." *N.J.S.A.* 58:10-23.11r.

resources are needed.

The Legislature decided that whatever else was needed would come not from the taxpayers but from the polluters themselves.[2] It allowed the DEP to obtain the money for cleanup and removal of hazardous substances by demanding payment from alleged polluters prior to any hearing. To discourage refusal to comply with a DEP demand for payment, the Act imposes treble damages on the party refusing initial payment if that party is ultimately found to have been liable. *N.J.S.A.* 58:10–23.11f(a). It is that part of the solution to this problem that today's decision weakens, perhaps severely.

The methods devised by the Legislature of assuring relatively rapid cleanup of these sites include imposition of almost absolute liability for cleanup and removal costs. "An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this Act." *N.J.S.A.* 58:10–23.11g(d). Moreover, liability is "joint and several." Anyone "in any way responsible" for the discharge that ultimately poisons a site is liable for all cleanup and removal costs. *N.J.S.A.* 58:10–23.11g(c). In other words, a party, free of any negligence, who discharges hazardous materials on a particular site, is fully liable for all damages caused

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[2]Contributions from responsible parties figure prominently in this state's overall toxic cleanup scheme. According to a recent DEP report, "New Jersey expects approximately $500 million in contributions from private responsible parties to meet the total program goal of $1.6 billion." New Jersey Department of Environmental Protection, *New Jersey Hazardous Waste Management Program Update* 1 (March 1987).

by the contamination of that site and all cleanup costs even though the discharges of other parties may have been greater and may have involved negligence. The party deemed liable is left to seek contribution from other parties responsible for the contamination of the site.[3]

The majority expresses no objection to the Legislature's imposition of absolute liability and joint and several liability. It is the next step in the Legislature's attempt to remedy the problem that causes the Court to hesitate in executing this law as written by the Legislature. The legislation provides that one designated by the DEP as liable for these costs may be required on demand of the DEP—before any adjudication of such

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[3]In New Jersey we have, until recently, accepted without question the idea that joint tortfeasors—those whose actions together add up to the total damage—are "jointly and severally" liable for the damages caused. The severity of the common-law rule was such that one could not obtain contribution even from those whose culpable actions were the major cause of the problem. That injustice has been remedied to a great extent, *see N.J.S.A.* 2A:15–5.3, but there has been no general change in the law that holds each one of the joint tortfeasors liable for the entire damage, whether or not it is able to obtain contribution. The Legislature has recently placed certain limitations on the liability of joint tortfeasors, but these explicitly do not apply in environmental cases. *See L.*1987, *c.* 325, § 3 (to be codified at *N.J.S.A.* 2A:15–5.2) (joint tortfeasor in non-environmental case responsible for 20% or less of harm is liable only for attributable share of damages; party responsible for over 20% but less than 60%, though liable for full amount of economic damages, is liable only for attributable share of noneconomic damages); *see also* Licensed Alcoholic Beverage Server Fair Liability Act, *L.*1987, *c.* 152, § 6 (to be codified at *N.J.S.A.* 2A:22A–6) (alcohol beverage server determined to be a joint tortfeasor is "responsible for no more than that percentage share of the damages which is equal to the percentage of negligence attributable to the server"); *L.*1987, *c.* 404, § 5 (to be codified at *N.J.S.A.* 2A:15–5.5 *et seq.*) (similar limitation on liability of social hosts for alcohol-related a idents).

liability—to undertake the entire cleanup and removal task. Alternatively, as the Court today correctly holds, the party may be required to pay to the DEP, on its demand, an amount sufficient to enable the DEP (or its contractors) to effect the cleanup and removal itself. If, on demand for that sum, the designated party fails to pay, it is, should it ultimately be held liable, liable not only for the entire cost, but for three times that cost. *N.J.S.A.* 58:10–23.11f(a). The treble damages provision of the Act thus "provides strong incentives to private parties to participate in the hazardous waste cleanup process and to determine the extent of their liability after such participation has commenced." *Woodland Private Study Group v. New Jersey, Dep't of Envtl. Protection*, 616 *F.Supp.* 794, 811 (D.N.J.1985). The statute allows for the possibility that a party wrongly but honestly believing that it is not liable (or not liable for the amount demanded) will suffer punitive treble damages if it withholds payment based on that belief. It is this possibility that prompts the Court to modify the remedy.

The Court holds that treble damages are not recoverable if the responsible party's refusal to pay is based on "good cause" even when that party is, in fact, fully liable. "Good cause" is not fully described, but it appears to be an honest belief, grounded on objective fact, that the party is not liable or, if liable, is not liable for the amount claimed. As the majority says, "[i]f the court determines that a company's basis for noncompliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances." *Ante* at 82. Precisely what this means is not clear. It may imply, in addition to a defense based on the objective reasonableness of a refusal to comply with the DEP's demand for funds, a further defense, in the action to

recover treble damages, that the DEP's request is "not reasonable in light of all the circumstances."

Before dealing with the legal analysis of the Court's limitation on this treble damage power, a summary of its practical effect is instructive. As written by the Legislature, this seemingly harsh provision might have promptly supplied the State with the wherewithal to meet its cleanup and removal goals. Those companies partly or fully responsible for creating hazardous waste sites would presumably have readily paid the amount demanded in order to avoid the risk of treble damages. Many of them are fully able to make such payments with only minimal impact on their operations. The State would be able to start and finish the cleanup. And the alleged polluter, if indeed it was not liable or was overcharged for the cost of the cleanup, would be entitled to reimbursement from the State through the Fund. The goal, immediate cleanup and removal, would have a chance of being achieved.

It is the importance of this goal that seems not to have had a sufficient impact on the Court's analysis. The threat of damage from these sites is severe and imminent. Failure to address the threat will be deleterious not only to industry and growth but to life itself. The goal of the challenged provision is to force polluters to pay prior to litigation so that the State can address the problem immediately.

Balanced against this goal, the Court posits the potential unfairness of the remedy. An uninsured small business, truly in doubt as to its liability, may be faced with a grim choice. It may pay, thereby placing the company in financial jeopardy notwithstanding the prospect of reimbursement, or, alternatively, it may refuse to pay and risk an ultimate treble damage sanction. If unfairness does result, the administrator of the

Fund has discretion to compromise a claim against a discharger that would otherwise be subject to the treble damage penalty because of its refusal to pay. It is noteworthy that in the companion case, *I.M.O. J.I.S. Industrial Service Company Landfill*, 110 *N.J.* 101 (1987), the DEP, after making a demand for payment (in that case to finance a design and feasibility study), thereby triggering potential treble damages, settled the matter apparently by agreeing to various contributions from numerous dischargers. In other words, the law does not require the enforcement agency to act unfairly. *See N.J.S.A.* 58:10–23.11q.

The Court underestimates the potential impact of its "good cause" exception to the treble damages remedy. Each discharger will seek to slip through the loophole created in this case. Whether it be the small business or the multinational corporation, management, in deciding whether to refuse to pay, will ask itself whether the circumstances might persuade a judge—or a jury—that the company's refusal was reasonable, or that treble damages were not "reasonable in light of all of the circumstances." See *ante* at 82.

The concept of "good cause" has performed a great service in the law, especially where narrow specifics in legislation or decisional law are not feasible. The virtue of "good cause"—its flexibility, its expansiveness, its ability to cover many different kinds of situations, difficult to define in advance—is in this situation a vice. Instead of the assured prompt flow of funds to the State from those who are responsible for polluting our environment, instead of the prompt cleanup and removal of hazardous substances, we will have delay and litigation leading to the compromises that have for so long afflicted governmental attempts to act effectively in this area.

This is an arena where desperately needed action has been dreadfully delayed. *IMO J.I.S. Indus. Serv. Co. Landfill*, *supra*, 110 *N.J.* 101, is but one example. After twenty years, the courts, the DEP, and the polluter are still arguing about a plan for cleanup. With today's judicially designed exception to liability, we can expect more of the same—delay reinforced by the predictable reluctance of judges and juries to impose treble damages on a polluter who shows some semblance of honesty and "good cause" in not putting up the money.

No balancing of societal interests—assuming this were a permissible concern of the Court—calls for such a result. By that balance the Court, in order to avoid the possibility of unfair application to a few, may be seriously impeding society's attempt to escape the certain substantial destruction caused by these poisonous sites. Our need for the swift action that the threat of treble damages would elicit dwarfs the unfairness that may result from the actual imposition of this remedy.

The Court has created the "good cause" exception not because the Act without it would be unconstitutional, but rather because the Act "may" be unconstitutional. *Ante* at 82. Noting that "none of the individual components of the Spill Act enforcement framework violates [federal] due process requirements," the Court concludes that the "combined weight" of its various elements "*may* be beyond constitutional tolerance." *Ante* at 79–82 (emphasis supplied). The Court moreover suggests that the Act may be invalid under the New Jersey Constitution and our State's "doctrine of fundamental fairness." *Ibid.* Never having decided that the statute does infringe state or federal constitutional rights, or our state's concept of fundamental fairness, the Court nevertheless con-

cludes that it is forced to "the choice between invalidating the Spill Act and reading a provision into the Act," *i.e.*, the "good cause" exception. *Ante* at 82. The Court has seriously weakened the statute in order to avoid a constitutional deficiency that it has never found and one that, in my opinion, does not exist.

It is difficult to meet the Court's constitutional argument, since the majority concedes that "it is sufficient for the due process guarantee of the federal Constitution that there be *some* forum where an order's validity can be challenged without penalty; it need not be the same forum where enforcement actions are prosecuted and the challenge need not be pre-payment." *Ante* at 79. Perhaps the strongest argument that the Court can muster to support its doubt about the constitutional validity of these provisions is its statement that "the United States Supreme Court has never before ruled on the constitutionality of a statutory enforcement scheme that combined, as the Spill Act does, joint and several liability, nearly absolute liability, the virtual elimination of substantive defenses, mandatory treble damages, and no pre-enforcement hearing." *Ante* at 79. Each of those, however, as the Court has pointed out, *ante* at 79–82, is constitutional; there is no payment and was indeed liable) is proof of the Legislature's intent.

The Court's analysis of the possible claims of Kimber and Solar in this case, *ante* at 85–86, indicates the myriad circumstances that this Court envisions as perhaps giving rise to "good cause" to refuse payment. The effect of this broad exception, then, will be to encourage a polluter to resist DEP demands for cleanup and removal funds. What will occur is a

full-blown trial involving complex questions of liability and quantum of damages that will likely take years to resolve. And that will be followed by appeals. One can predict that with the treble damage inducement thus drained of its strength, the State will be forced to look elsewhere for the needed financing to fund cleanups as spills occur. Meanwhile, continued delay will render cleanup and removal of hazardous substances increasingly difficult and expensive. By creating an exception where none was intended by the Legislature nor required by the Constitution, the Court has, I fear, significantly diminished the State's ability to deal effectively with a critical problem.

The Court effectively holds that unless a good cause defense is allowed the statute in its operation violates due process. *Ante* at 82. The Court notes, however, that treble damages could be assessed against polluters in a law that contained no demand-refusal triggering mechanism. *Ante* at 85–86. As the Court points out, "[t]he Supreme Court regularly applies antitrust legislation, which, like the Spill Act, combines treble damages with joint and several liability. The Sherman Antitrust Act has been interpreted in a way that those subjected to onerous joint and several liability provisions have no right of contribution." *Ante* at 86 (citations omitted). A demand-refusal triggering mechanism can, from that vantage point, be viewed as less onerous than the impact of antitrust legislation: not only does our substantive law allow a right of contribution from other tortfeasors, but treble damages can be escaped by paying the underlying liability on demand. The payment of more than was required, would have the right of reimbursement from the Fund. It strains credulity to infer that the Legislature intended, through its treble damage threat,

not only to obtain funds from a possible polluter but to prevent a party, on proof of its innocence, from recouping what it had been unjustly forced to pay the State.

The Court notes that "the DEP maintains that no recourse to the Fund or its arbitration procedures may be had by a partially responsible discharger," and concludes that "[t]hus the remedy is illusory in almost all cases." *Ante* at 79 n. 4. Obviously, no recourse to the Fund may be had by any "partially responsible discharger" if, under the law, that discharger is liable for the entire damage. It is difficult to understand how the statute is unconstitutional (or the remedy "illusory") in failing to provide reimbursement to a party that has paid all of the damages when that party is in fact liable for all of the damages. If the partially responsible discharger has been overcharged for the total cost of the cleanup, however, that discharger must have recourse against the Fund.

If this is the concern that leads the Court to question the constitutionality of the statute, its insubstantiality is apparent. It is eliminated by a construction of the statute that is not only reasonable but compelled.

Had the Legislature intended a "good cause" exception, or anything like it, it would have said so. It provided, in this very Act, that penalties for failure to pay the tax imposed by the Act might be remitted if such failure "was excusable under the circumstances," *N.J.S.A.* 58:10–23.11h(e); no similar excuse is provided for refusal to pay for cleanup costs, *see N.J.S.A.* 58:10–23.11g(d). Moreover, the Legislature was undoubtedly aware of the provision in the parallel federal statute triggering treble damages only where the polluter's failure to clean up was "without sufficient cause." 42 *U.S.C.* § 9607(c)(3). The fact that our Legislature saw fit to impose treble damages

without the slightest mention or hint that any excuse would suffice to avoid this sanction (if the party refused demand for Court nonetheless invalidates the statute, or more accurately, finds an implied "good cause" exception without which the statute "may" be unconstitutional. As the Court puts it, "[d]ue process standards *arguably* call for a right to challenge the validity of a legislative or administrative order without facing the possibility that one will incur a greater penalty if such challenge is unsuccessful than the loss resulting from such an order if left unchallenged." *Ante* at 79 (emphasis supplied).

It is widely recognized that the requirements of due process cannot be determined in the abstract, without regard to the concrete interests at stake in a given circumstance. *See Jamouneau v. Harner, supra*, 16 *N.J.* at 514 ("The basic right of private property perforce yields to an overriding public need."). In none of the due process cases cited by the Court was the state's interest as urgent and as weighty as it is here. Our state has found that in order to remove as quickly as possible the poisons that menace the public health and welfare, vast sums must immediately be made available to commence the effort. The only way such sums will be available is if polluters are forced to pay their fair share and to do so now. The Legislature has determined, and correctly so, that ordinary legal process is wholly inadequate for this purpose. Lawsuits to compel removal and cleanup, to recover damages on proof of liability, and to recover treble damages would all afford traditional due process, but would leave the state Fund without the means to satisfy its immediate need for funds from polluters.

The Legislature has concluded that the only remedy that will suffice is one that threatens severe sanctions against polluters who fail to pay immediately on demand. The process that is

due to targeted companies, the Legislature has concluded, is the right, *after such payment*, to sue to recover all or some of the payment if it is ultimately determined that the company involved either was not liable at all, or was liable for less than it paid. If the process that is due to such polluters requires more, requires that they be allowed not to pay in advance, but to contest their liability before payment, or to escape the treble damage sanction because of a reasonable belief as to their non-liability, the Legislature's goal will not be achieved, the money will not be forthcoming, the poison will not be removed. I do not believe that society is powerless to arrange for an immediate cleanup of these sites by forcing those who have caused the damage to pay for that cleanup up front. I do not believe that the only method by which the legislative goal of immediate cleanup can be achieved is through general taxation. That, unfortunately, is the result of today's decision.

I suggest that the Court goes wide of the mark in its conclusion that today's holding will cause little damage to the Legislature's effort to clean up hazardous waste sites immediately. Today's decision does not reckon with the unprecedented nature of the risk facing this state and its citizens. There is no room for judicial interference with this attempt at self-preservation. Only the clearest constitutional infirmity could justify today's result. I find none, and the Court finds, at most, that "maybe" such a defect exists. I would allow this statute to be enforced as written.

For affirmance as modified—Justices CLIFFORD, HANDLER, O'HERN, GARIBALDI and STEIN—5.

Dissenting—Chief Justice WILENTZ—1.

APPENDIX B — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED MAY 24, 1988

SUPREME COURT OF NEW JERSEY
September Term 1987

M-1104/1105
26,116

IN THE MATTER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

(Kimber Petroleum Corporation)

This matter having been duly presented to the Court, it is ORDERED that the motions for reconsideration (M-1105) and for a stay of the judgment (M-1104 are denied, provided, however, that with the consent of the Attorney General, movant shall have 10 days from the filing date of this Order within which to comply with the judgment of the Court.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 24th day of May, 1988.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED OCTOBER 20, 1986

SUPREME COURT OF NEW JERSEY
September Term 1986
M-4/22/23/24
A-127/128

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR OIL COMPANY.

ORDER ON MOTIONS AND
ORDER GRANTING CERTIFICATION

This matter having come before the Court on motions for Appellants Kimber Petroleum Corporation and Solar Oil Company for a stay pending appeal (M-4), supplementation of the record (M-22), acceleration (M-23), and leave to file an overlength brief (M-24), and the Appellants having previously applied for temporary emergency relief under Rule 2:9-8, including a stay of the determination of the New Jersey Department of Environmental Protection, Division of Waste Management (DEP) embodied in its Directive dated May 29, 1986, directing payment of $2,164,137.00 for work to be undertaken pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 to -23.11z, and for an Order enjoining and restraining the DEP from seeking sanctions, penalties, or both, including treble damages, against Appellants during the pendency of this action, which relief was granted in part by a single-justice order dated July 31, 1986;

And the Court having considered the matter and good cause having been-shown;

It is ORDERED that the partial stay heretofore granted by the Order dated July 31, 1986, of paragraph 16 of the Department's Directive of May 29, 1986, which reads as follows:

Appendix C

NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:

16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137.00 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to the "Treasurer, State of New Jersey"

NOTICE

If Respondents fail to make the payment referenced in Paragraph 16 within thirty (30) calendar days after receipt of this DIRECTIVE, the Department will conduct the RI/FS of the Landfill site using public founds. In addition, should Respondents fail to make such payment, the Department will commence suit against the Respondents seeking damages and reimbursement for all costs incurred. Specifically, failure to comply with this DIRECTIVE will increase Respondents' liability to the Department in an amount equal to three (3) times the costs of conducting the RI/FS, pursuant to Section 7 of the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11f.

is modified, in that the enforcement of the terms of paragraph 16 of said Directive is partially stayed to permit Appellants, within thirty (30) days from the filing date of this Order, either to make direct payment to fund costs as required by said paragraph 16,

or to furnish a satisfactory bond or other security conditioned upon the payment of said costs in the event the validity of said Directive is sustained on appeal; and, as a condition to compliance with the partial stay directing the payment of costs or posting security as aforesaid, it is further

ORDERED that the Department of Environmental Protection shall be and is hereby enjoined from seeking or imposing sanctions or penalties, including treble damages, based upon the failure or refusal of these appellants to pay the amounts set forth in Paragraph 16 of the Directive of May 29, 1986, pending the disposition of the within motion for a stay and pending the disposition of the appeal; and it is further

ORDERED that the motion to supplement the record (M-22) is hereby reserved, and that the motions for acceleration (M-23) and for leave to file an overlength brief in support of the motion (M-24) are hereby granted; and it is further

ORDERED that the within appeal pending in the Appellate Division is hereby certified directly to this Court to be heard together with *IMO the J.I.S. Industrial Service Company Landfill.*

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1986.

s/ Stephen W. Townsend
Clerk

APPENDIX D — ORDER OF JUSTICE CLIFFORD, SUPREME COURT OF NEW JERSEY DATED JULY 31, 1986

SUPREME COURT OF NEW JERSEY
September Term 1986

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION SHELL OIL COMPANY AND SOLAR OIL COMPANY.

ORDER

This matter having come before a single Justice on application of Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade, P.C., attorneys for Appellant Kimber Petroleum Corporation, Edwin R. Matthews, Esq. appearing, and Farrell, Curtis, Carlin & Davidson, attorneys for Appellant Solar Oil Company, for temporary emergency relief under Rule 2:9-8 in the form of an Order staying the decision and/or action of the New Jersey Department of Environmental Protection, Division of Waste Management, embodied in its Directive dated May 29, 1986, directing payment of $2,164,137.00 for work to be undertaken pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 to -23.11z, and for an Order enjoining and restraining the New Jersey Department of Environmental Protection, Division of Waste Management, from seeking sanctions and/or penalties, including treble damages, against Appellants during the pendency of this action, and for an Order, pursuant to Rule 2:5-5(b) to supplement the record on appeal by the taking of additional evidence and the making of findings of fact thereon by a judge of the Superior Court especially designated for that purpose, and for an Order accelerating the appeal,

Appendix D

And a single Justice having considered the papers filed in support of the application and arguments of counsel, and Ross A. Lewin, Deputy Attorney General, appearing on behalf of the New Jersey Department of Enviromental Protection in opposition thereto, and for other good cause shown;

It is on this 3lst day of July, 1986,

ORDERED that so much of the Directive of May 29th, 1986, as reads as follows:

> NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:
>
> 16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137.00 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey"

be and is hereby stayed as to these Appellants until September 4th, 1986, and until further Order of the Court, reserving for the full Court the issue whether the State will possess a cause of action for treble damages for expenditures made during the course of this stay; and it is

FURTHER ORDERED that the New Jersey Department of Environmental Protection, Division of Waste Management, be and hereby is enjoined and restrained from seeking sanctions and

or penalties including treble damages against Appellants for noncompliance with the Directive during the pendency of this stay.

s/ Robert L. Clifford
ROBERT L. CLIFFORD,
Associate Justice

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DATED JULY 31, 1986

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART O

JUDGES SIMPSON
SHEBELL

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

MOVING PAPERS FILED: JULY 17, 1986
ANSWERING PAPERS FILED: JULY 25, 1986
DATE SUBMITTED TO COURT: JULY 17, 1986
DATE ARGUED: JULY 17, 1986
DATE DECIDED: JULY 31, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR STAY AND TO SUPPLEMENT ADMINISTRATIVE RECORD

GRANTED: _____
DENIED: xxxx
OTHER: _____

Appendix E

SUPPLEMENTAL:

FOR THE COURT:

s/ Thomas F. Shebell, Jr.
THOMAS F SHEBELL, JR., J.A.D.

WITNESS, THE HONORABLE THOMAS F. SHEBELL, JR. PRESIDING JUDGE OF PART 0 , SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 31st DAY OF JULY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX F — ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DATED JULY 17, 1986

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART O

JUDGES SIMPSON
SHEBELL

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

MOVING PAPERS FILED: JULY 17, 1986
ANSWERING PAPERS FILED:
DATE SUBMITTED TO COURT: JULY 17, 1986
DATE ARGUED: JULY 17, 1986
DATE DECIDED: JULY 17, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR STAY AND TO SUPPLEMENT
ADMINISTRATIVE RECORD

GRANTED:_____
DENIED: _____
OTHER: xxx

Appendix F

SUPPLEMENTAL: TEMPORARY STAY PENDING FURTHER CONSIDERATION OF THE MOTION IS GRANTED UP TO AND INCLUDING JULY 31, 1986. THE GRANTING OF THIS STAY SHALL NOT IN ANY WAY AFFECT THE STATE'S RIGHT TO TREBLE DAMAGES WHICH IT MIGHT OTHERWISE BE FURTHER ENTITLED TO. THE STATE MAY FILE A REPLY TO THE MOTION ON OR BEFORE 4 P.M. JULY 25, 1986.

FOR THE COURT:

s/ Thomas F. Shebell, Jr.
THOMAS F. SHEBELL, JR. J.A.D.

WITNESS, THE HONORABLE THOMAS F. SHEBELL, JR. JUDGE OF PART 0, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS DAY OF JULY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX G — STATE OF NEW JERSEY DEPARMENT OF ENVIRONMENTAL PROTECTION DIRECTIVE IN THE MATTER OF KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY, AND SOLAR OIL COMPANY, DATED MAY 29, 1986

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WASTE MANAGEMENT
CN 407 - Trenton, NJ 08625

DIRECTIVE

IN THE MATTER OF KIMBER PETROLEUM CORPORATION; SHELL OIL COMPANY; AND SOLAR-OIL COMPANY,

Respondents.

This DIRECTIVE is issued to the above-captioned Respondents pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "the Department" or "NJDEP') by N.J.S.A. 13:1D-1 *et seq.* and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, and duly delegated to the Assistant Director for Enforcement of the Division of Waste Management pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The Kimber Petroleum Corporation, a New Jersey corporation, a successor to the Allen Oil Company, operates a gasoline station (the "Kimber Station") located at Block 220, Lots 2 and 9, on Lakeside Avenue in West Milford, New Jersey.

2. Shell Oil Company, a Delaware corporation, owned and operated a Shell gasoline station (the "Shell Station") located

at Block 276, Lots 17D and 19A, on Lakeside Avenue, in West Milford, New Jersey, until August of 1984.

3. The Solar Oil Company, a New Jersey corporation, owned and operated a gasoline station (the "Solar Station") located at Block 218, Lots 47 and 47A, on Lakeside Avenue, in West Milford, New Jersey, until 1983.

4. The above referenced gasoline stations are or were all located on three corners of the intersection of Lakeside Avenue, Union Valley Road and Greenwood Lake Turnpike in West Milford, New Jersey (hereinafter "the intersection").

5. During the course of investigations conducted by the Department and others between October 4, 1984 and April 22. 1986 a total of twelve (12) potable wells located in the vicinity of the intersection referenced in paragraph 4 were found to be contaminated with hazardous substances, benzene and petroleum hydrocarbons. This residential neighborhood is also known as the Stainsby Court area. It has also been determined that a large plume of ground water contaminated with hazardous substances, benzene and petroleum hydrocarbons, is migrating from the area of the intersection and threatens the potable water supply of several other homes in the Stainsby Court area, as well as the potable water supply of at least one hundred (100) homes in the Greenbrook Estates area of West Milford, which is located southwest of the intersection.

6. Based on the existence of the ground water contamination referenced above, the New Jersey Geological Survey has identified an area of West Milford in which no new potable water wells may be installed. This includes the Stainsby Court

area, the Woodland and Slater Roads area, and the Greenbrook Estates area.

7. During the course of the investigations referenced above, seven (7) monitoring wells were installed at the Kimber station. Analysis of samples taken from these wells indicate the presence of hazardous substances, petroleum hydrocarbons.

8. During the course of the investigations referenced above, four (4) monitoring wells were installed at the Solar station. Analysis of samples taken from the wells indicate the presence of hazardous substances, petroleum hydrocarbons.

9. During the course of the investigations referenced above, four (4) monitoring wells were installed at the Shell station. Analysis of samples taken from these wells indicate the presence of hazardous substances, petroleum hydrocarbons, in the ground water at this site.

10. The hazardous substances referenced above were discharged into the waters and onto the lands of the State of New Jersey and continue to discharge into the waters of the State in violation of Section 4 of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11c.

11. The Kimber Petroleum Corporation, the Solar Oil Company, and the Shell Oil Company (hereinafter referred to as the "Respondents") are responsible for the discharge of hazardous substances.

12. Pursuant to N.J.S.A. 58:10-23.11g(c), the Respondents are strictly liable, jointly and severally, without regard to fault, for all costs of the cleanup and removal of the hazardous substances discharged.

Appendix G

13. Pursuant to N.J.S.A. 5:10-23.11(f), whenever any hazardous substance is discharged, the Department may, in its discretion, act to remove or arrange for the removal of such discharge, or may direct the discharger to remove or arrange for the removal of such discharge.

14. In order to provide those residences and commercial establishments whose domestic wells have been contaminated, with a safe, dependable supply of potable water; and in order to eliminate the threat posed to the water supply of certain other residences and commercial establishments, it is necessary to:

    a. Connect, by a transmission main with related appurtenances and valves, the Stainsby Court homes to the production wells in Greenbrook Estates. This will include distribution mains and homeowner connections with individual water meters.

    b. Develop a new supply source of at least 75 gpm capacity in an area outside of the zone of contamination as designated by New Jersey Geological Survey. This will include designing and constructing the appropriate test wells, treatment, drilling and outfitting no more than two supply wells, facilities, and well houses. A transmission line will carry the water to the service area. After this supply source is completed the Greenbrook production wells will be taken off-line and may be upgraded. A storage tank of 150,000 gallon capacity will be installed.

    c. Replace the current distribution system in Greenbrook Estates with appropriately sized water mains and related appurtenances and valves, and homeowner connections with individual water meters.

d. Connect Woodland and Slater Roads with distribution mains, related appurtenances and valves, and homeowner connections with individual water meters.

e. Seal all private wells in the designated project area.

15. The Department currently estimates that the cost of completing the work referenced in paragraph 14 is $2,164,137.

DIRECTIVE

NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:

16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

NOTICE

If Respondents fail to make the payment referenced in paragraph 15 within thirty (30) calendar days after receipt of this DIRECTIVE, the Department will conduct the work referenced in paragraph 14 using public funds. In addition, should Respondents fail to make payment, the Department will commence suit against the Respondents seeking reimbursement for all costs incurred. Further, failure to comply with this DIRECTIVE will increase Respondents' liability to the Department in an amount equal to three (3) times the cost of conducting the work referenced in paragraph 14, and will cause a claim and lien to be placed

upon all of the Respondents real and personal property pursuant to section 7 of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11(f), including a first priority claim and lien on the property subject to the cleanup and removal.

RESERVATION OF RIGHTS

In the event that the costs of conducting the work referenced in paragraph 14 exceed the estimate specified above, the Department reserves the right to direct the Respondents to pay such additional costs and to seek full reimbursement and treble damages for all such additional costs if Respondents fail to pay same. In addition, the Department reserves the right to direct Respondents to take, or arrange for the taking of any and all additional remedial actions which the Deparment determines to be necessary to protect public health and safety or the environment, and to seek full reimbursement and treble damages for all costs incurred in taking such additional remedial actions if the Respondents fail to comply with such a directive. Finally, the Department reserves all rights and remedies under the Spill Compensation and Control Act in addition to those referred to above.

Respondents are advised that the discharges referenced in the DIRECTIVE may also constitute violations of the Water Pollution Control Act, *N.J.S.A.* 58:10A-1 *et seq.* and that Respondents may therefore be subject to the penalties prescribed for violations of the Water Pollution Control Act. The Department reserves all rights and remedies under said Act.

Appendix G

DEPARTMENT OF ENVIRONMENTAL PROTECTION

s/ Joseph A. Rogalski
Joseph A. Rogalski
Assistant Director
Field Operations, Compliance
and Enforcement

DATE: May 29, 1986

If you have any questions regarding this Directive please contact Richard J. Ericsson, Esq. at (609) 292-9398.

Yours truly,

s/ Joseph A. Rogalski
Joseph A. Rogalski
Assistant Director

Enclosure
c: Sylvia Unseld
David Shotwell
Kimberly Hoover
Richard J. Ericsson, Esq.
Jack B. Kirsten
Corporation Trust Company

APPENDIX H—STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION DIRECTIVE II IN THE MATTER OF KIMBER PETROLEUM CORPORATION AND SOLAR OIL SUSSEX, INC., DATED MARCH 3, 1987

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Division of Hazardous Waste Management
John J. Trela, Ph.D., Acting Director
401 East State St.
CN 028
Trenton, N.J. 08625
609-633-1408

DIRECTIVE II

IN THE MATTER OF KIMBER PETROLEUM CORPORATION and SOLAR OIL SUSSEX, INC.

Respondents

This Directive II is issued to the above-captioned Respondents pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter the "Department" or "NJDEP") by N.J.S.A. 13:1D-1 *et seq.* and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, and duly delegated to the Assistant Director for Enforcement of the Division of Hazardous Waste Management, pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The NJDEP issued Directive I to Kimber Petroleum Corporation, Solar-Oil Company and Shell Oil Company on May 29, 1986. The FINDINGS set forth therein are incorporated by reference into this Directive II and are made part hereof.

2. Based upon information available at the time that Directive I was issued, the NJDEP believed that Solar-Oil Company was a proper Respondent. Solar-Oil Company alleged in correspondence dated June 23, 1986, that the proper responsible party was Solar Oil Sussex, Inc., a related company to Solar Oil Company. The Department concurs.

3. Solar Oil Sussex, Inc. had actual notice of its potential responsiblity under Directive I and has, through its representatives, communicated with the Department regarding the terms of compliance with Directive I.

4. Based upon information available at the time that Directive I was issued, the NJDEP believed that Shell Oil Company was a proper Respondent. The Department has reviewed data submitted by Shell Oil Company on August 29, 1986 and subsequent confirming submissions, as well as submissions made by Kimber Petroleum Company on December 1, 1986. Upon review of all evidence now before the Department, the Department has concluded that it does not have sufficient evidence to implicate Shell Oil Company as responsible for the contamination and, therefore, DIRECTIVE I should be withdrawn with regard to Shell Oil Company.

5. Paragraph fourteen (14) of Directive I stated the following:

> "In order to provide those residences and commercial establishments whose domestic wells have been contaminated, with a safe, dependable supply of potable water; and in order to eliminate the threat posed to the water supply of certain other residences and commercial establishments, it is necessary to:

Appendix H

a. Connect, by a transmission main with related appurtenances and valves, the Stainsby Court homes to the production wells in Greenbrook Estates. This will include distribution mains and homeowner connections with individual water meters.

b. Develop a new supply source of at least 75 gpm capacity in an area outside of the zone of contamination as designated by New Jersey Geological Survey. This will include designing and constructing the appropriate test wells, treatment, drilling and outfitting no more than two supply wells, facilities, and well houses. A transmission line will carry the water to the service area. After this supply source is completed, the Greenbrook production wells will be taken off-line and may be upgraded. A storage tank of 150,000 gallon capacity will be installed.

c. Replace the current distribution system in Greenbrook Estates with appropriately sized water mains and related appurtenances and valves, and homeowner connections with individual water meters.

d. Connect Woodland and Slater Roads with distribution mains, related appurtenances and valves, and homeowner connections with individual water meters.

e. Seal all private wells in the designated project area."

6. Subsequent to the issuance of Directive I, the Department consulted with representataives of the homeowners in Stainsby Court, and it was concluded that Stainsby Court would not be connected to Greenbrook Estates, as indicated in subparagraph 14a of Directive I, quoted in paragraph four (4) above, until the new source of water supply was developed. Accordingly, though the Stainsby Court and Greenbrook Estates water systems are to ultimately be connected by a transmission main, it is no longer considered part of the first phase of the water supply project contemplated in Directive I, but rather is to be undertaken after the new water supply source is developed under subparagraph 14b of Directive I.

7. Paragraph sixteen (16) of Directive I directed the Respondents to do the following:

> "Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137 to the Department to fund the costs of the work referenced in paragraph 14 [as quoted in paragraph 4 above] within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

8. The sum of money identified in Paragraph 16 of Directive I included $3,000 per homeowner that is to be contributed by ninety-four of the homeowners to be connected to the new water supply, for a total of $282,000. The Department has determined that this sum need not be included in the total estimated cost of the water supply project.

Appendix H

DIRECTIVE ADDENDUM

NOW, THEREFORE, DIRECTIVE I IS HEREBY AMENDED AS FOLLOWS:

9. References in Directive I to "Solar-Oil Company" are hereby amended to refer to "Solar Oil Sussex, Inc.".

10. Directive I is withdrawn as applicable to Shell Oil Company.

11. The connection of Stainsby Court to Greenbrook Estates is not to be considered part of the first phase of the water supply project described in paragraph fourteen (14) of Directive I, but rather is to occur after the development of the new water supply source described in subparagraph 14b. The estimated cost of the Project is not changed by this modification.

12. Paragraph sixteen (16) of Directive I is amended to state as follows:

> "Arrange for the conduct of the work referenced in paragraph 15 by paying *$1,882,137* to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

NOTICE

13. Should future investigations at the site defined in Directive I reveal new evidence to the Department of potential responsibility on the part of Shell Oil Company, the Department reserves the

right to take appropriate action against Shell. Further, should the Department or the Respondents need to take, or have taken, samples or monitor, or have monitored, any of the walls installed by Shell's contractor at the site, Shell will be expected to cooperate. Prior written approval of the Department is required in the event that Shell desires to seal any of its wells at the site.

14. This Directive II in no way affects the duties and obligations of the Respondents under the terms of Directive I, unless specifically modified under the terms of this Directive II.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: s/ Ronald T. Corcory
Ronald T. Corcory
Assistant Director for Encorcement
Division of Hazardous Waste
Management

DATE: 3/3/87

APPENDIX I—NOTICE OF APPEAL DATED AUGUST 22, 1988

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, ACTING COMMISSIONER OF THE STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

Kimber Petroleum Corporation hereby gives notice of its intention to appeal from the judgment and opinion of the New Jersey Supreme Court filed April 18, 1988 and the denial of the motion for recommendation [*sic. - should read reconsideration*] filed May 25, 1988. This appeal is taken under 28 U.S.C. § 1257(2). This appeal is from the judgment of the New Jersey Supreme Court upholding the constitutionality of the enforcement mechanism of the New Jersey Spill Compensation and Control Act and from that portion of the judgment which affirms the directive issued to Kimber Petroleum Corporation pursuant to the New Jersey Spill Compensation and Control Act.

Dated: August 22, 1988

Appendix I

s/ Edwin R. Matthews
Edwin R. Matthews
BUDD LARNER GROSS
PICILLO ROSENBAUM
GREENBERG & SADE
150 John F. Kennedy Pkwy.
CN 1000
Short Hills, New Jersey 07078
Attorneys for Appellant
Kimber Petroleum Corporation